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IN THE

Supreme Court of the United States

No. 247.

October Term, 1949.

ARTHUR W. GIBSON,
Petitioner,

v.

INTERNATIONAL FREIGHTING CORPORATION,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI.

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STATEMENT OF THE CASE.

We are unable to accept the "Summary Statement of the Matter Involved" of the Petitioner. The facts set forth in the Petition for Certiorari, Pages 1 to 5, are merely a statement of what the Petitioner had hoped to establish as the facts of the case at the trial before a jury. Although there was some testimony, principally from the Petitioner himself, to support these facts, there was also abundant, clear and convincing testimony to the contrary. The high spots of this testimony produced by the Respondent are, first, that the throttle incident was a pure fabrication and had, in fact, never occurred. The Deck Log Book, (Record p. 670) the Engineroom Log Book (offered in evidence by Petitioner, Record p. 231) and the testimony of the Master (Petitioner's appendix p. 195) all agreed that there had been no breakdown of engines at or near the time in question, and that the engines had not been stopped, as claimed by the Petitioner. The engineroom revolution counter, as recorded in the Engine Room Log, and which automatically records the number of revolutions showed approximately the same number of revolutions for

the watch on which this alleged incident occurred as it did for other watches while the vessel was proceeding at the same speed. There was also abundant and reliable testimony from two leading heart specialists in the City of Philadelphia, Dr. William D. Stroud (Record p. 480) and Dr. Charles C. Wolferth (Record p. 399), that the heart condition, coronary occlusion, from which the Petitioner suffered, was not brought on by exertion. Carefully tabulated case history tables demonstrated that the majority of patients suffering from coronary occlusion experienced its onset while asleep or resting (Record p. 150). Another large percentage encountered its onslaught while engaged in ordinary mild activity.[1] The jury, by its verdict in favor of the Defendant, must have believed this testimony rather than that produced by the Petitioner. Therefore, the Petitioner's complaint as to the manner in which the Court charged the jury as to unseaworthiness and negligence becomes purely moot, because, if the jury believed that the throttle incident never occurred, and that its assertion was a pure fabrication, there was no occasion to consider the technical legal aspects of either negligence or unseaworthiness.

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[1] The American Journal of Medicine—Vol. II, No. 5, pages 501-516 (at page 510).

TABLE III

TYPES OF ACTIVITY AT ONSET OF CORONARY OCCLUSION
(1,068 Attacks)

	Per Cent
Sleep	22.5
Rest	29.5
Ordinary mild activity	21.0
Moderate activity (except walking)	9.0
Walking	16.0
Unusual or severe exertion	2.0
Total	100.0

ARGUMENT.

The Petitioner concedes that the questions of law raised in this appeal are moot. (Page 15, Petition for Certiorari). This is a civil action against an operating agent for the War Shipping Administration, and under the recent decisions of *Cosmopolitan Shipping Company, Inc. v. McAllister,* 69 S. Ct. 1317; *Fink v. Shepherd Steamship Co.,* 69 S. Ct. 1330; and *Gaynor v. Agwilines, Inc.,* 69 S. Ct. 1330; this cause of action must fall.

However, Petitioner urges the Court to disregard this most important point in the case and reverse the United States Court of Appeals, Third Circuit, below, so that the jury's verdict, affirmed by the Trial Court and again affirmed by the Court of Appeals, will not prejudice another action pending in Admiralty against the United States by this same claimant arising out of the same cause of action. Petitioner candidly admits that he seeks the process of this Court, not with any hope of success in this action but for the sole purpose of aiding him in other pending litigation.

This Brief should stop here. But because this Court may choose to consider the matter further, as requested by Petitioner, we are compelled to proceed to answer his argument, and here proceed to do so.

The Petitioner has selected several excerpts from the charge to the jury in the Court below, alleging them as error, and standing alone, there might be some slight basis for this contention. However, when considered with the other parts of the general charge and considered with the other points for charge which were affirmed and read to the jury, this contention is completely without merit. See *George A. Fuller Co. v. McCloskey,* 228 U. S. 194; *Washington and Georgetown Railroad v. Gladmon,* 82 U. S. 114.

Before even considering this question further, it should be noted that at the end of the charge the Trial

Judge asked Counsel for both sides (Petitioner's Appendix, p. 245)—"The Court: Are there any questions?". Counsel for Petitioner did not there make the objection he now asserts before this Court and did not, therefore, give the Trial Judge an apportunity to correct any error, if any there was. See *Congress and Empire Spring Company v. Edgar,* 99 U. S. 487.

The contention of Petitioner that the Trial Judge by his charge precluded recovery for unseaworthiness is without merit because the Trial Judge in several instances, which we shall point out, did charge that if the jury found the subject vessel unseaworthy, they should find in favor of the Plaintiff.

In the beginning of his charge the Court told the jury regarding unseaworthiness: (Petitioner's Appendix 213)

> ". . . he puts several causes for damages before us for consideration. The first one is the condition of the machinery on the ship. He says that the machinery on the ship didn't operate properly, that this valve stuck, and that it stuck in a manner that was unusual, and either through the negligence of the persons who installed the machinery or negligence of a fellow seaman who last shut it down, or some inherent defect in the machinery itself, that is, in the valve, it stuck, and in that way the ship was not a seaworthy, efficient ship. That is the claim that he has set forth."

After referring to evidence that the valve had stuck, the Court then said, "That is a question of fact that you will have to decide,—as to whether the ship was in a seaworthy condition with reference to this appliance that has been described."

At the end of the charge the Court charged Plaintiff's seaworthy points practically verbatim, to wit: (Petitioner's Appendix, page 226)

"'(1) Because of the condition of the seaman's employment, the policy of the maritime law has been to consider the seamen as a ward of the admiralty and the law places a great responsibility upon the operator of the vessel for the safety and welfare of the members of the crew. The seaman is subject to the strict discipline of the sea and all the conditions of his service require him to accept without question and without protest such working conditions and appliances as are furnished by the vessel once he embarks on the voyage. These conditions have generated the exacting requirements that the vessel must provide seamen with safe and seaworthy appliances with which to do his work and likewise require that safe appliances be furnished when and where the work is to be done.'

"That cites a number of decisions of the Appellate Courts on that particular subject, members of the jury, and they will be copied in the record but I will not burden the reporter with reading them now.

"The operator must not only provide but must also maintain and keep in proper working order all of the appliances and equipment appurtenant to the vessel.

"'(2) A much higher obligation as to equipment and appliances is imposed by law upon employers of seamen than upon employers of shoreworkers who may at anytime withdraw from the service and refuse to use equipment and appliances considered unsafe. Under the maritime law, there is an absolute duty on the part of the ship and her owners or operators to provide a seaworthy vessel and to supply and keep in order the proper appliances and equipment appurtenant to the ship. This obligation does not depend

upon the exercise of reasonable care but is absolute. In other words, there is absolute liability on the part of the owners or operators of a merchant vessel for injuries sustained by a seaman by reason of the unseaworthiness of the vessel or the failure to supply and keep in order the proper appliances appurtenant to the ship.

"'(3) If you find that the throttle in the engine room was not in proper operating condition and required unusual effort to turn it, and if you find that plaintiff's illness was precipitated by an unusual exertion while attempting to turn the throttle,'—

"I want to add some words, 'while in an improper condition', so that the sentence will read:

"'If you find that the throttle in the engine room was not in proper operating condition and required unusual effort to turn it, and if you find that plaintiff's illness was precipitated by an unusual exertion while attempting to turn the throttle, while in an improper condition, your verdict should be for the plaintiff and you should award him damages for all of the consequences flowing from that act.'

"I affirm these points."

All of the points for charge submitted by Petitioner were read to the jury and affirmed by the Court, with the exception of No. 7, which was withdrawn by Petitioner's Counsel (Petitioner's Appendix, page 234).

In amending a point submitted by Respondent, the Court instructed the jury (Petitioner's Appendix, page 239):

"It is for the jury to decide if 'the alleged turning of the valve or the alleged failure of the Defendant to have the Plaintiff examined by a doctor or hos-

pitalized while in Jacksonville, had anything to do with increasing this deposit collecting inside of the coronary artery. The contention of the Plaintiff is that the exertion on the valve or throttle and the failure to have a doctor examine the Plaintiff at Jacksonville or to hospitalize him there contributed to the ultimate occlusion or complete stoppage of blood passing through that artery. You must weigh this medical testimony and determine whether the Plaintiff has met the burden of proof imposed upon him by law to establish with reasonable certainty that the alleged exertion in closing the throttle and/or the neglect to have the plaintiff examined by a doctor or hospitalized at Jacksonville, produced the occlusion or complete stoppage. If you believe, from all of the medical testimony, that these two factors did not cause or substantially contribute to the occlusion or stoppage, then your verdict must be for the Defendant.'

"I affirm that Point."

Petitioner's counsel prepared a set of Interrogatories to be answered by the jury. Respondent did not; and over the objection of Respondent's counsel, the Petitioner's Interrogatories were submitted by the Court to the jury. We quote them here with the answer given by the jury (Petitioner's Appendix, page 262).

"INTERROGATORIES TO BE ANSWERED BY THE JURY.

November 26, 1947.

(1) Did the defendant fail in its duty to provide and keep in proper order a safe and properly operating throttle in the engine room?

Answer: Yes or No *No*

(2) If your answer to the preceding interrogatory be yes, then was that failure a preciptationg factor in the development of the plaintiff's condition?

Answer: Yes or No (*Not answered*)

(3) Did the defendant fail in its duty to provide and obtain proper care and attention for the plaintiff?

Answer: Yes or No *No*

(4) If your answer to the preceding interrogatory be yes, then did that failure materially contribute to the development of the plaintiff's condition?

Answer: Yes or No (*Not answered*)

(5) Is your verdict for the plaintiff or the defendant?

Answer: *Defendant*

(6) If your verdict is for the plaintiff, what sum do you find as damages?

Answer: (*Not answered*)

(7) If your verdict is for the plaintiff, state how much you awarded him for each of the following items, if any:

Loss of Wages to date $ (*Not answered*)
Loss of future earning power $ (*Not answered*)
Pain and Suffering $ (*Not answered*)"

The very last words by the Court to the jury before the latter retired had to do with whether or not it was undisputed that Petitioner had moved or attempted to move the throttle. The Court said (Petitioner's Appendix, page 247):

"He also was under the impression, perhaps, I left you with the thought that the question as to whether or not Mr. Gibson moved this throttle or attempted to move the throttle is an undisputed point. I did not mean to convey any such impression, because it is affirmed on one side and denied on the other, and you will have to say whether Mr. Gibson attempted to turn that throttle or not as testified to, or whether that is entirely false as the defendant believes it to be. I will leave that entirely up to you.

"Swear the bailiffs."

The Petitioner's argument that a tort feasor must take his victim as he finds him and is responsible for all consequences, is inappropriate here. First, he assumes as a fact that the Respondent committed a tort. The jury's verdict clearly indicates otherwise. The Petitioner at this point in effect argues that the result establishes the tort. It is reasonable for the ship operator to believe that its machinery and gear will be operated by normal persons. If, however, it is defective and, as a result, on one hand a normal person is slightly injured and, on the other hand, an infirm person is severely injured by reason of the same defect, the vessel owner is of course responsible for the full consequences in either case. However, if the machinery is in such condition that only an abnormal person would be harmed by its normal use, the consequences which flow from the abnormality of the person affected does not establish the fact that the machinery was negligently defective and the vessel unseaworthy. The testimony about the valve or throttle was not that it was stuck or stiff from the standpoint of someone with a heart condition, but in the ordinary sense of those words. The jury could have so found and if they had, then within the Court's instruction, they could have concluded that the throttle was not in proper operating condition and required unusual effort to turn it. In that event, the jury's answer to the First Interrogatory would have been "Yes". The answer was "No".

The jury by its verdict either believed, as they were clearly justified in doing from the testimony and the charge of the Court, that the throttle incident never occurred and was a pure fabrication on the part of the Petitioner, or that the throttle was not stiff or stuck and thus the jury completely disposed of Petitioner's unseaworthy theory.

CONCLUSION.

It is respectfully submitted that the decision of the United States Court of Appeals, Third Circuit, is right and the Petition for Certiorari should be denied.

Respectfully submitted,

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